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IN THE

Supreme Court of The United States

October Term, 1973

No. 73-1883

LAKE TRANSPORT, INC.,
Petitioner,

V.

RAILROAD COMMISSION OF TEXAS, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

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SUBJECT INDEX

Page

Questions Presented 1

Involved Statutes 2

Statement of the Case 2

The Writ Should Be Denied for The Following Reasons 7

Conclusion 12

Proof of Service 13

APPENDIX

A.

Statutes Involved 14

Pertinent Sections of Article 911b Texas Revised Civil Statutes Annotated:

Section 1(h) 14

Section 6(a) 14

Section 6 bb 14

Rule 10 of the Rules of Practice and Procedure for the Transportation Division, The Railroad Commission of Texas 15

CITATIONS

Page

Air Reduction Company v. Hickel, 420 F.2d 592 (D.C.Cir. 1969) 11

Association of Data Processing Service Organizations v. Camp, 397 US 150, 25 L Ed 2d 184, 90 S Ct 827 10

Federal Power Commission v. Colorado Interstate Gas Company, 348 US 492, 99 L Ed 583, 75 S Ct 457 8

Flast v. Cohen, 392 US 83, 20 L Ed 2d 947, 88 S Ct 1942 10

Groendyke Transport, Inc. v. Railroad Commission, 426 SW 2d, 645 (Tex.Civ.App. 1968, writ ref'd, n.r.e.) 7

TEXAS REVISED CIVIL STATUTES ANNOTATED

Article 911b, § 1(h) ..... Appendix A14

Article 911b, § 6(a) ..... Appendix A14

Article 911b, § 6-bb ..... Appendix A14

Article 911b, § 20 6

RULES

Rule 10 of the Rules of Practice and Procedure for the Transportation Division, The Railroad Commission of Texas ..... Appendix A15

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QUESTION PRESENTED

The case involves a question of Texas law which does not involve and cannot be made to involve any issue arising under the Federal Constitution.

The question is whether petitioner, Lake Transport, Inc., the holder of an inactive contract carrier permit issued to it by the Railroad Commission of Texas, and who at all material times was not transporting property for compensation or hire, had stand-

ing to appeal an order of the Railroad Commission of Texas granting Coastal Transport Company, Inc., a certificate of public convenience and necessity as a specialized motor carrier. The Trial Court, the Court of Civil Appeals, and the Supreme Court of Texas have resolved the question against the petitioner.

INVOLVED STATUTES

Sec. 1(h), Sec. 6(a) and Sec. 6-bb of Article 911b, Tex.Rev.Civ. Stat. Ann. and Rule 10 (formerly Rule 30) of the Rules of Practice and Procedure for the Transportation Division, The Railroad Commission of Texas, which are attached hereto as Appendix "A," are pertinent hereto, in addition to the statutes attached as Appendix "B" to the Petition for Certiorari.

STATEMENT OF THE CASE

Because of inaccuracies in petitioner's statement, we here state the nature of the case. The facts as here stated are substantially as stated by the Texas Court of Civil Appeals (Appendix B to Petition, pages 18-22) and the Supreme Court of Texas (Appendix C to Petition).

By an application filed on June 22, 1970, Respondent Coastal Transport Co., Inc., sought additional authority as a Specialized Motor Carrier transporting, among other things, Gypsum Board Paper in Rolls, of not less than 4,000 pounds each, and Gypsum and Gypsum Products, between the plantsite of United States Gypsum Company at Galena Park, Texas, on

the one hand, and, on the other, all points in Texas, subject to certain restrictions (Tr. 14, S.F. 24). Petitioner filed a written notice of protest to such application, which notice was dated July 1, 1970, and received by respondent Railroad Commission on July 6, 1970. Protests were also filed by Brown Express, Inc., Central Freight Lines, Inc. and Red Arrow Freight Lines, Inc. These protests were withdrawn prior to hearing (Tr. 14). With the filing of protests under Rules 19 and 20 of the Commission's Rules of Practice (S.F. 27), the application became a "protested" proceeding. Hearing was held at Austin, Texas on December 8, 1970, and was concluded after the sixth day of hearing (S.F. 24). Petitioner's Contract Carrier Permit No. 12058 issued in January, 1964, is all of the authority issued to petitioner by the Railroad Commission of Texas which served as a basis for its protest of Respondent Coastal's application (S.F. 25). Petitioner's Contract Carrier Permit No. 12058 authorized it to operate as a *contract carrier* transporting among other things Gypsum Paper, Wallboard and Sheathing from the facilities of the United States Gypsum Company at Galena Park, Texas to all points in Texas within a four hundred (400) mile radius of Galena Park, Texas and vice versa, for United States Gypsum Company (S.F. 24, 25). The only contract under the terms of which Lake Transport, Inc. provided transportation service for United States Gypsum Company from October, 1968, to November 12, 1970, contained a provision as follows:

> "9. This contract is subject to termination at any time by either party upon 30 days' written notice to the other and shall continue in effect until so terminated."

(S.F. 25, 26). The only contract under the terms of which petitioner provided transportation service for United States Gypsum Company from October 19, 1968, to November 12, 1970, was cancelled by United States Gypsum Company in writing effective November 12, 1970, and no transportation service of any kind has been provided for United States Gypsum Company by petitioner under authority of Contract Carrier Permit No. 12058 since said date (S.F. 25, 26).

Prior to the commencement of the hearing on the application of respondent Coastal, it filed a motion to strike the protest of petitioner on the ground that petitioner was a contract carrier, and its contract with United States Gypsum Company, the supporting shipper in respondent Coastal's application, had been terminated and because of the termination of the contract, petitioner was not a proper party protestant within the meaning of the Commission's Rules of Procedure (Tr. 15). That motion was overruled by the Hearing Examiner *as a preliminary matter,* and petitioner was permitted to participate in the proceeding (Tr. 15).

The Examiner found that it was not necessary to decide whether or not petitioner was technically a proper party protestant (Tr. 46), and he further found as follows:

"As the applicant points out in its brief, a contract carrier has no statutory obligation apart from its contract, to provide service to a contracting shipper. Likewise, the Commission has no statutory authority to require a contract carrier to serve its supporting shipper or shippers. It follows that as a general proposition the Commission should not require a contracting shipper to utilize a particular contract carrier. The contract carrier permit issued to Lake only authorizes service under a continuing contract with USG. The Commission cannot dictate the terms of the contract between Lake and USG or for that matter force the parties to enter into a contract. There now exists no contract beween the parties, and at least with respect to USG no intention to again enter into a contract with Lake. It is therefore the Examiner's opinion that in the absence of such contract, Lake is not properly authorized to serve USG and hence, is not an 'existing carrier' within the meaning of Art. 911b." (Tr. 48).

The Examiner found that the application of respondent Coastal should be granted, in part, and so recommended (Tr. 51, 52).

Exceptions to the Examiner's Report and Recommended Order were filed by petitioner (Tr. 54). Reply thereto was filed by respondent Coastal (Tr. 94), oral argument was requested by petitioner and after oral argument before the full Commission, by order served November 4, 1971, the Commission adopted the Examiner's Report and granted the authority to respondent Coastal to the extent recommended by the Examiner (S.F. 94).

From the foregoing, it is clear that contrary to the

assertions of petitioner, the petitioner was *never* held by the Railroad Commission of Texas to be a proper party protestant—a party in interest—even though the Examiner *preliminarily* overruled respondent Coastal's motion to strike petitioner's protest, and it is further clear that, as found by the Court of Civil Appeals (Appendix B to Petition, pages 24-25), the Examiner could have properly sustained respondent Coastal's motion to strike petitioner's protest under the provisions of Rule 10 (Appendix A) at the beginning of the proceeding before the Railroad Commission.

Petitioner then sought to invoke the appeal provisions of Sec. 20, Article 911b, Tex.Rev.Civ.Stat.Ann. (Appendix G to Petition, page 115).

The Trial Court sustained respondent' Coastal's plea in abatement to petitioner's suit, on the ground that petitioner had no justiciable interest and was without standing to seek judicial review of the order of the Railroad Commission granting respondent Coastal's Specialized Motor Carrier Certificate. (Appendix A to Petition, page 14, and Appendix C to Petition, page 31). That action was affirmed by the Court of Civil Appeals, the intermediate Court, and by the Supreme Court of Texas, (Appendices B and C to Petition), both Courts having held that petitioner *was not* a motor carrier at interest with any statutory or constitutional right to appear and protest respondent Coastal's application, or to appeal under Section 20 of Article 911b.

THE WRIT SHOULD BE DENIED FOR THE FOLLOWING REASONS

1. The Legislature of Texas has provided for review of action of the respondent Railroad Commission in Sec. 20, Art. 911b. As the Supreme Court of Texas pointed out in its opinion in this case, the following statement of the rule from 2 Am.Jur.2d, Administrative Law, Sec. 559 was quoted with approval in *Groendyke Transport, Inc. v. Railroad Commission*, 426 SW 2d, 645 (Tex.Civ.App. 1968, writ ref'd, n.r.e.):

> "Where judicial review of administrative action is provided in the statute under which the administrative action is taken, the right of appeal to the courts is to be determined by looking at the statute, the valid regulations promulgated pursuant to it, and proven administrative practice throwing light upon their meaning."

The Supreme Court also in its opinion in this case pointed out that:

> "It was also recognized in *Groendyke* that Rule 10 of the Commission (formerly Rule 30) has been in effect in substantially the same form since 1946 and has consistently been enforced to disallow appearances by protesting specialized motor carriers who held no permanent certificated authority to perform any of the services proposed to be performed by an applicant."

This is *not* a case where no review of the administrative action is available.

It cannot be disputed, however, that to invoke the review procedure, one must satisfy the statutory requirements of the review statute. For example, in

Federal Power Commission v. Colorado Interstate Gas Company, 348 US 492, 99 L Ed 583, 75 S Ct 467, it was held that the provisions of the Natural Gas Act prescribing explicitly the procedure to be followed by any person seeking review of an order of the Federal Power Commission, which procedure limits the scope of review, must be followed.

The crux of the matter is that petitioner is not within the class which may invoke the appeal provisions of the statute—as the undisputed facts demonstrate that it is not a party in interest under Sec. 20 of Article 911b and Rule 10. The respondent Railroad Commission and all of the Courts below have correctly so held.

As the Supreme Court of Texas found, the shipper cancelled its contract with petitioner November 12, 1970 (almost a year prior to the issuance of the order which petitioner seeks to attack), pursuant to the contractural provisions for termination, and the right of such cancellation is not questioned. The undisputed facts are that petitioner had the same contractual right of cancellation and it could not be required by the respondent Railroad Commission to continue to serve the contracting shipper, or any other. Petitioner's contention that it was "harmed" by the grant of respondent Coastal's certificate and its declaration that it was "put out of business" by the grant of such authority, are both contrary to the undisputed facts and to the determinations made by the Supreme Court of Texas that petitioner's existing

service was not impaired because petitioner was not performing any service—it *was not an existing carrier.* As the Supreme Court of Texas correctly found:

> "Necessarily, the right of appeal provided by the statute presupposes that an appealing carrier is authorized to perform, and is performing, the character of service authorized by the Commission; thus the appealing carrier is in a position to show not only that the new service will impair its existing service by the loss of sustaining revenues, but also by reason of the availability of the existing services, there is not a public need for the newly authorized service.
>
> It is manifest that the holder of an inactive contract carrier permit such as Lake cannot make this showing. It is of no significance in this respect that it is the policy of the Commission not to subject such a permit to cancellation. The salient fact is that Lake is not performing an existing service and may never do so again. Lake is not a common carrier and, as stated, is under no duty or responsibility as such. It cannot show any impairment of its service. To say that Lake has a statutory right of appeal under such circumstances would be to say that it has the right to defeat a service which it is not rendering and even to the limited extent of its permit, a service which it may possibly never render again; and this notwithstanding the common carrier service in question has been found by the Commission to be required by the public convenience and necessity. In our view, such an anomaly was not intended by the Legislature and is precluded by the requirement in Section 20 of Article 911b that an appealing party must be a party at interest and one in the position to show that the order under attack is unreasonable and unjust as to its existing service . . . ." (Appendix C to Petition, pages 34-35).

Petitioner has not been denied due process under any concept and has not raised any federal question nor are any authorites cited by petitioner applicable to the facts of this case.

2. There is no conflict between the opinion and judgment of the Supreme Court of Texas and the holdings of this Court on standing.

The cases relied upon by petitioner are distinguishable from this case. In *Association of Data Processing Service Organizations v. Camp,* 397 US 150, 25 L Ed 2d 184, 90 S Ct 827, the plaintiff was a "competitor" within that class of "aggrieved" persons who were held to be entitled to review of "agency action" as opposed to petitioner's situation here, where it is *not* an existing carrier, *not* a "competitor" under the undisputed facts, and, as the Supreme Court of Texas has correctly found, cannot show that the respondent Railroad Commission's action was unreasonable or unjust as to its existing service, and cannot show any impairment of its service.

In *Flast v. Cohen,* 392 US 83, 20 L Ed 2d 947, 88 S Ct 1942, a taxpayer's suit, it is clearly shown that before a person has standing to sue, it must first show that it is a proper party or party at interest. There it was held that the taxpayer had a personal stake in the outcome of the controversy, which, as pointed out above, is not the case here. Petitioner is not an existing carrier and cannot show any impairment of its service.

Air Reduction Company v. Hickel, 420F.2d 592 (D.C.Cir. 1969) simply holds that the complaining parties had standing to challenge an agency's regulations because they had existing beneficial business relations which would be terminated and interfered with by such regulations. That, again, is not the case as to petitioner here.

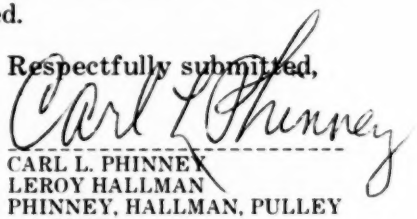
The authorities cited do not support petitioner's position.

CONCLUSION

Not being an existing carrier, petitioner's existing service has not been impaired, nor has petitioner been harmed or injured. Therefore, petitioner is not within that class described in the applicable statute and rules of the respondent Railroad Commission as parties in interest, and, consequently it has no standing to appeal this proceeding. It has not been denied any constitutional or statutory guarantee.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Carl L. Phinney, one of the attorneys for Respondents herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 11th day of July, 1974, I served three copies of the foregoing document, in duly-addressed envelopes, with postage prepaid, as required by Rule 33(1) of this Court, upon each of the following parties:

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APPENDIX A
STATUTES INVOLVED

PERTINENT SECTIONS OF ARTICLE 911b TEXAS REVISED CIVIL STATUTES ANNOTATED

Section 1(h):

> (h) The term "contract carrier" means any motor carrier as hereinabove defined transporting property for compensation or hire over any highway in this State other than as a common carrier.

Section 6(a):

> Sec. 6. (a) No motor carrier now operating as a contract carrier or that may hereafter desire to engage in the business of a contract carrier shall so operate until it shall have received a permit from the Commission to engage in such business and such permit shall not be issued until the applicant shall have in all hings complied with the requirements of this Act; nor shall such permit be issued unless the character of business being done or to be done by the applicant strictly conforms with the definition of a contract carrier. The Commission shall have the power to suspend for ten (10) days any existing permit after notice and hearing and to revoke any existing permit when it appears that such permit holder has disobeyed or violated any provision of this Act or of General Laws regulating motor vehicles or violated any rule or regulation of the Commission authorized by this Act.

Section 6 bb:

> Sec. 6-bb. No application for permit to operate as a contract carrier shall be granted by the commission to any person operating as a common

carrier and holding a certificate of convenience and necessity, nor shall any application for certificate of convenience and necessity be granted by the Commission to any person operating as a contract carrier nor shall any vehicle be operated by any motor carrier with both a permit and a certificate.

Rule 10 of the Rules of Practice and Procedure for the Transportation Division, The Railraod Commission of Texas:

Rule 10: Parties in Interest.

Any party in interest may appear in any proceeding before the Transportation Division. All appearances shall be subject to a motion to strike upon a showing that the party has no justiciable or administratively cognizable interest in the proceeding. As applied to proceedings under Article 911a and 911b of the Revised Civil Statutes of 1925 involving operating authority, a party in interest is any carrier operating over a route within that territory or serving any point proposed to be served by any applicant, and transporting any of the same class or classes of commodities or persons proposed to be transported by the applicant.